(1)

Supreme Court, U.S.
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86-807
No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

ROBERT K. MORROW, INC., Trustee,
Petitioner,

vs.

AGRI-BEEF CO., INDEPENDENT GRAIN CO., and WALDRIP BROS. CO.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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November 17, 1986

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50 pp

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals, in affirming the District Court's affirmance of Bankruptcy Court orders dismissing adversary proceedings against creditors, has decided a question of federal law in a way which is in conflict with decisions of other federal courts of appeals.

2. Whether the Court of Appeals, in affirming the District Court's affirmance of Bankruptcy Court orders dismissing adversary proceedings against creditors, has decided an important question of federal law which has not been, but should be, settled by this Court.

LIST OF PARTIES

The parties to the proceeding in the United States Court of Appeals for the Ninth Circuit were:

Robert K. Morrow, Inc., Trustee, Plaintiff-Appellant

Agri-Beef Co., Defendant-Appellee

Independent Grain Co., Defendant-Appellee

Waldrip Bros. Co., Defendant-Appellee

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ROBERT K. MORROW, INC., Trustee,
Petitioner,

vs.

AGRI-BEEF CO., INDEPENDENT GRAIN CO., and WALDRIP BROS. CO.,
Respondents.

PETITION FOR WRIT OF CERTIORARI

Petitioner Robert K. Morrow, Inc., Trustee, respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

I

OFFICIAL REPORT OF OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 797 F.2d 790 (9th Cir. 1986). A copy of said opinion appears at Appendix "A" to this petition.

II

GROUNDS FOR JURISDICTION

A. Date of Judgment Sought To Be Reviewed

The judgment of the United States Court of Appeals for the Ninth Circuit that is sought to be reviewed by this petition was filed on August 19, 1986.

B. Statutory Provision Conferring Jurisdiction

The Jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

III

STATUTE INVOLVED

This case involves the provisions of Section 547 of the Bankruptcy Code (11 U.S.C. § 547).[1] The statute is set forth in Appendix "G" to this petition.

---

[1] The involuntary petition against the debtor was filed prior to October 9, 1984, the effective date of the non-jurisdictional amendments to the Bankruptcy Act of 1978 enacted by the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("BAFJA"). BAFJA included changes in the language of § 547. All references and citations to the Code herein shall be to the pre-BAFJA language, which is the law applicable to this adversary proceeding. BAFJA, Pub.L. No. 98-353, § 553(a), 98 Stat. 333, 392 (1984).

IV

STATEMENT OF THE CASE

A. Facts

The facts in this case are simple and are not in dispute.

On August 23, 1982, an involuntary petition for relief under Chapter 7 of the United States Bankruptcy Code was filed against Kenitra, Inc. ("Kenitra" or the "debtor"). An order for relief was subsequently entered against Kenitra, and Robert K. Morrow, Inc. is the duly appointed and qualified successor trustee ("Trustee") of this Chapter 7 estate.

More than ninety days before the filing of the involuntary petition, Kenitra delivered checks to the respondents herein. On May 21, 1982, the debtor delivered a check in the amount of $9,087.65 to Independent Grain Company. On the same day, the debtor delivered a check in the amount of $11,101.75 to Waldrip Bros. Co. On May 24, 1982, the debtor delivered a check in the amount of $10,416.26 to Agri-Beef Co. The bank on which the checks were drawn honored them within ninety days of the filing of the petition (the "preference period").[2]

---

[2] The preference period under the Bankruptcy Code is (a) in the case of all creditors, on or within 90 days before the date of the filing of the petition, or (b) in the case of creditors who were insiders at the time of the transfer, between 90 days and one year before the date of the filing. 11 U.S.C. § 547(b)(4).

Under the Bankruptcy Act, which has now been repealed, the preference period was the 4 months preceding the filing of the petition. 11 U.S.C. § 96(a)(1).

B. Proceedings Below

On August 9, 1984, the Trustee commenced adversary proceedings before the United States Bankruptcy Court for the District of Oregon to avoid the above-described payments by check as preferences under 11 U.S.C. § 547(b).

The parties did not dispute below that the payments by check were transfers of property of the debtor, that the payments were made to creditors on account of antecedent debts, or that the payments were made while the debtor was insolvent. The parties agreed as well that the payments entitled such creditors to receive more than they would otherwise have received in a Chapter 7 case. However, the parties disagreed as to whether the transfers were made on or within 90 days before the filing of the petition.

The Trustee and the respondents each moved the Bankruptcy Court for summary judgment with respect to whether the transfers took place within the preference period. The Trustee contended that the transfers by means of the debtor's checks occurred when the checks were honored, and hence were avoidable as preferences. The respondents contended below that the transfers took place when the checks were delivered, and hence that the transfers occurred outside the 90-day preference period.

On December 28, 1984, the Bankruptcy Court entered its orders dismissing with prejudice the Trustee's complaints against Agri-Beef Co. and Independent Grain Company. Copies of said orders appear at Appendix "D" and Appendix "E," respectively, to this petition. The Bankruptcy Court also entered an order partially dismissing the Trustee's complaint against Waldrip Bros. Co. A copy of that order is set forth at Appendix "F" hereto. The partial summary judgment in favor of Waldrip Bros. Co. did not

adjudicate the status of another check which was both delivered and honored within ninety days of the filing of the petition.

The Trustee filed timely appeals from the Bankruptcy Court's orders to the United States District Court for the District of Oregon. The District Court consolidated the adversary proceedings for purposes of appeal. On July 26, 1985, the District Court entered its order affirming the Bankruptcy Court's dismissal of adversary proceedings. The District Court's opinion appears at Appendix "B" to this petition, and its order is set forth at Appendix "C" hereto.

The Trustee appealed in a timely manner from the District Court's decision to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit affirmed the District Court's affirmance of the Bankruptcy Court orders dismissing adversary proceedings against the respondents. It is this decision of the Court of Appeals which the instant petition seeks to have reviewed.

C. Basis For Federal Jurisdiction in the Court of First Instance

Jurisdiction of the Bankruptcy Court was based upon 28 U.S.C. § 1334 and 28 U.S.C. § 157.

V

ARGUMENT

A. The Requested Writ Should Issue Because a Sharp Split of Authority Exists Between Federal Courts of Appeals

Rule 17 of the Rules of the United States Supreme Court provides that review on a writ of certiorari is a matter of judicial discretion and will be granted only when there are special and important reasons therefor. As demonstrated below, such special and important reasons exist in this case in the form of a sharp and irreconcilable conflict among circuit courts of appeal over an issue that affects hundreds of litigants and millions of dollars.

The Court of Appeals for the Ninth Circuit holds in *In re Kenitra, Inc.*, 797 F.2d 790 (9th Cir. 1986) ("*Kenitra*") that under 11 U.S.C. § 547(b):

> "A debtor's payment by check on an existing debt, presented to the bank within a reasonable time and honored by the bank, is deemed made at the time the debtor gave the check to the creditor."

797 F.2d at 791.

The Ninth Circuit's decision in *Kenitra* plainly conflicts with decisions of the Second, Seventh and Eleventh Circuits in bankruptcy cases involving precisely the same question, i.e., the time a transfer is effected by a debtor's uncertified check for purposes of the preference statute. Those courts of appeal have each held that the transfer occurs on the date that the check is honored by the drawee bank. *Nicholson v. First Investment Co.*, 705 F.2d 410 (11th Cir.

1983); *Klein v. Tabatchnick*, 610 F.2d 1043 (2d Cir. 1979); *Fitzpatrick v. Philco Finance Corp.*, 491 F.2d 1288 (7th Cir. 1974).

Bankruptcy cases and bankruptcy litigation are a rapidly growing area of the law that touches significantly upon a multitude of aspects of commercial, industrial and consumer business. Recovery of preferential transfers by the trustee is frequently the principal, if not the only, meaningful source of revenue comprising a bankruptcy estate for distribution to general creditors. The number of reported decisions concerning avoidable preferences rivals or exceeds those in any other area of bankruptcy practice and it is not hyperbole to suggest that the question in issue affects millions, if not literally billions, of dollars now in dispute or soon to be placed in dispute in bankruptcy courts across the United States. Naturally, the conflict in decisions among the circuits impacts most seriously in cases pending in the Ninth Circuit. The Court will note, for instance, the admonition to trustees and bankruptcy practitioners in the last paragraph of the *Kenitra* decision (Appendix "A").

Prior to *Kenitra*, the Ninth Circuit's most significant pronouncement on the issue came in *Shamrock Golf Co. v. Richcraft, Inc.*, 680 F.2d 645 (9th Cir. 1982) ("*Shamrock*"). *Shamrock* interpreted section 3(a)(2) of the 1898 Bankruptcy Act, former 11 U.S.C. § 21(a)(2). 680 F.2d at 646. To the extent that no conflict heretofore existed among the circuits relative to section 547 of the Bankruptcy Reform Act of 1978 (the "Bankruptcy Code"), the Ninth Circuit, faced with the opportunity to join the majority on this question, chose instead to sharpen the conflict in *Kenitra*.

Kenitra's holding under § 547(b) that the debtor's property is transferred upon delivery of its uncertified

check to a creditor is an aberration. In *Fitzpatrick v. Philco Finance Corp.*, the Seventh Circuit held that

> "[t]he better view seems to be that payment of the check by the drawee, rather than the sending or receipt of the check, constitutes the transfer under the Bankruptcy Act. 3 Collier on Bankruptcy 820-23 (14th ed. 1971).

491 F.2d at 1293.

Likewise, in *Klein v. Tabatchnick*, the Second Circuit held under section 60 of the Bankruptcy Act, 11 U.S.C. § 96, that a preference did not occur where an uncashed check was returned by the debtor to the check's maker within the applicable preference period. 610 F.2d at 1049. The return of the check was not a preference because no antecedent debt arose in favor of the check's maker from the mere delivery of the check. Rather, only honor of the check would have effected a transfer of property and given rise to a debt:

> "The check itself was merely a request to the drawee bank to pay. . . [the debtor]. . .; it did not operate as an assignment of these funds to . . .[the debtor] . . .[citation omitted]. Prior to the cashing of the check, there was simply no obligation owing to . . .[the check's maker] for which he could have had a recovery."

610 F.2d at 1049.

The Eleventh Circuit perhaps best observed the reasons for the prevailing view in *Nicholson v. First Investment Company*:

> "In the case of a check, the transfer is not completed at the time of delivery. *Creditors could prevent collection of the funds through such means*

> *as garnishment of the bank account.* Although in the non-bankruptcy context, a check honored in the ordinary course of business relates back to the date of delivery, *see Duke v. Sun Oil*, 320 F.2d 853, 861 (5th Cir. 1963), under the 'so far perfect' language of the Bankruptcy Act, the date of transfer is the date when the check is honored by the paying bank. *Accord, Fitzpatrick v. Philco Finance Corp.*, 491 F.2d 1288, 1293 (7th Cir. 1974). *Contra, Shamrock Golf Company v. Richcraft Inc.*, 680 F.2d 645 (9th Cir. 1982).

705 F.2d at 413 (emphasis added).

Section 547(e) provides in part:

> "(e) (1) For the purposes of this section — . . .
>
> (B) a transfer of a fixture or property other than real property is perfected *when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee.*
>
> (2) For the purposes of this section, except as provided in paragraph (3) of this subsection, a transfer is made —
>
> (A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 10 days after, such time. . ."

(Emphasis added.)

The debtor's property is not transferred until its check clears. For example, a creditor on a simple contract can levy on the debtor's bank account the day after the debtor delivers its check to the defendant-transferee but before the latter can cash the check. The creditor thus obtains a judicial lien on the funds in the account that is superior to

the interest of the transferee. The mere fact that a check is handed to the defendant-transferee does not suffice to transfer the debtor's funds. Observe also that the transfer cannot occur on delivery because the debtor could stop payment, *In re Advance Glove Mfg. Co.*, 25 B.R. 521, 524-25 (Bankr. E.D. Mich. 1982), or another outstanding check could clear causing the subject check to be dishonored without the "defendant" having received any payment.

The contrary reasoning by the Ninth Circuit also allows for the following anomalous situation. The creditor who levies against the drawer's bank account in the foregoing example does so to secure or enforce a previously unsecured debt (i.e., on a "simple contract"). If the levy occurs within 90 days of bankruptcy, the trustee is likely to be able to avoid the levy as a preferential transfer and to recover the funds for the benefit of general unsecured creditors. *See In re Orth-O-Vision, Inc.*, 49 B.R. 943, 945 (Bankr. E.D.N.Y. 1985). Absent bankruptcy, the levying creditor prevails over the check payee if the levy occurs before a previously delivered check can clear the drawee bank. However, the *Kenitra* rationale dictates that a trustee in bankruptcy can avoid the levy but not the later check transfer. It appears highly unlikely that Congress sought such an incongruous result when it enacted the preference statute, which is intended to implement the equal sharing principles of bankruptcy law. This result is, however, presently inescapable in courts in the Ninth Circuit.

This aberration has its roots in nothing more than a misguided adherence to *stare decisis*. In *Kenitra*, the court observed that the transfer-on-delivery rule is "a well-settled Ninth Circuit rule." 797 F.2d at 791. Its reasoning went no further than to cite *Shamrock* and *In re Walker Industrial Auctioneers, Inc.*, 45 B.R. 452 (Bankr. D. Ore. 1984), which

had simply followed *Shamrock*. Interestingly, the *Walker* court observed widespread criticism of *Shamrock* and "sound policy arguments" against it. 45 B.R. at 454. That court, however, felt bound by *Shamrock* and its decision was based on that notion. *Id.* at 455. *Walker* does not, however, provide reasoned authority for the position. Thus, *Kenitra* simply followed from *Shamrock* which had held no more than that a defendant did not commit an "act of bankruptcy" under section 3(a)(2) of the 1898 Bankruptcy Act, former 11 U.S.C. § 21(a)(2), when it paid an ordinary but overdue business debt by a business check delivered more than 120 days but honored less than 120 days before another creditor forced the payor-debtor into bankruptcy. 680 F.2d at 646.

B. The Requested Writ Should Issue Because This Court Should Settle An Important Question of Federal Law

Section 547 of the Bankruptcy Code, 11 U.S.C. § 547, is an important aspect of the trustee's avoiding powers, which allow the trustee to bring back into the estate transfers of the debtor's property that would otherwise be unavailable for an equitable distribution among creditors.

One of the essential elements that the trustee must prove in order to make out a prima facie case for the existence of a voidable preference is that the transfer of property of the debtor takes place during the preference period. The *Kenitra* problem arises whenever one of the debtor's checks in payment of an antecedent debt is delivered to the creditor outside the preference period, but honored by the drawee bank within such period.

The view that the debtor transfers property at the time the creditor receives a check drawn on the debtor's account has been accepted by a limited number of courts. *Kenitra; In re Advance Industries, Inc.*, 63 B.R. 677, 678 (Bankr. N.D. Iowa 1986); *In re Sider Ventures & Services Corp.*, 47 B.R. 406, 409 (S.D.N.Y. 1985); *In re Walker Industrial Auctioneers, Inc.*, 45 B.R. at 455; and *In re Blanton Smith Corp.*, 37 B.R. 303, 308 (Bankr. M.D. Tenn. 1984).

The overwhelming majority of courts have held the other way: *Matter of Foreman Industries, Inc.*, 59 B.R. 145, 149 (Bankr. S.D. Ohio 1986); *In re Hartwig Poultry, Inc.*, 57 B.R. 236, 239 (Bankr. N.D. Ohio 1986); *In re Ramy Seed Co.*, 57 B.R. 425, 429 (Bankr. D. Minn. 1985); *In re Midwest Boiler & Erectors, Inc.*, 54 B.R. 793, 795 (Bankr. E.D. Mo. 1985); *Matter of Almarc Mfg., Inc.*, 52 B.R. 582, 584 (Bankr. N.D. Ill. 1985); *In re Chase & Sanborn Corp.*, 51 B.R. 736, 737 (Bankr. S.D. Fla. 1985); *In re Insulation Materials, Inc.*, 47 B.R. 832, 835 (Bankr. E.D. Tenn. 1985); *Matter of Bridges Enterprises, Inc.*, 44 B.R. 979, 982 (Bankr. S.D. Ohio 1984); *Matter of Fasano/Harris Pie Co.*, 43 B.R. 871, 874 (Bankr. W.D. Mich. 1984); *Matter of Georgia Steel, Inc.*, 38 B.R. 829, 834 (Bankr. M.D. Ga. 1984); *In re Bob Grissett Golf Shoppes, Inc.*, 34 B.R. 320, 322 (Bankr. E.D. Va. 1983); *In re Video East, Inc.*, 33 B.R. 61, 63 (Bankr. E.D. Pa. 1983); *In re Brent Explorations, Inc.*, 31 B.R. 745, 751 (Bankr. D. Colo. 1983); *Matter of Ellison*, 31 B.R. 545, 547 (Bankr. M.D. Ga. 1983); *In re Moran Air Cargo, Inc.*, 30 B.R. 406, 408 (Bankr. D.R.I. 1983); *In re Skinner Lumber Co., Inc.*, 27 B.R. 669, 672 (Bankr. D. S.C. 1982); *In re Super Market Distributors Corp.*, 25 B.R. 63, 64-65 (Bankr. D. Mass. 1982); *In re Fabric Buys of Jericho, Inc.*, 22 B.R. 1010, 1011 (Bankr. S.D. N.Y. 1982); *In re Ardmore Sales Co., Inc.*, 22 B.R. 911, 913 (Bankr. E.D. Pa. 1982); *In re Sportsco, Inc.*, 12 B.R. 34,

36 (Bankr. D. Ariz. 1981); and *Matter of Duffy*, 3 B.R. 263, 265 (Bankr. S.D. N.Y. 1980).

Cases in which the determinative issue is whether the debtor's property is transferred by uncertified check upon honor by the drawee bank may involve large amounts of money or, as in the instant proceeding, modest sums. In either event, the issue of when a transfer by check occurs for purposes of section 547(b)(4) is an important federal question on which the courts are in disarray. Such an unsettled question of federal law invites resolution by this Court.

DATED: November 17, 1986

Respectfully submitted,

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APPENDIX A

No. 85-4068
DC No. CV 85-1083 JAR

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re Kenitra, Inc.

ROBERT K. MORROW, INC.,
Plaintiff-Appellant,

v.

AGRI-BEEF CO., INDEPENDENT GRAIN CO., and WALDRIP BROS.,
Defendants-Appellees.

Appeal from the United States District Court
for the District of Oregon
James A. Redden, District Judge, Presiding
Argued and Submitted - July 7, 1986
Portland, Oregon

OPINION

Before: WALLACE, FERGUSON, and NORRIS, Circuit Judges.

FERGUSON, Circuit Judge:

Plaintiff Robert K. Morrow, Inc., trustee for the debtor, Kenitra, Inc., appeals the district court's affirmance of the bankruptcy court's dismissal of adversary proceedings against defendants Agri-Beef Co. and Independent Grain

Co., and partial dismissal of an adversary proceeding against Waldrip Bros. We affirm.

I.

More than ninety days before creditors filed an involuntary bankruptcy petition against the debtor, the debtor gave checks to the defendants as payments on existing debts. The banks on which the checks were drawn honored them within ninety days of the date of the filing. The trustee filed adversary proceedings to avoid the payments as preferences under 11 U.S.C. § 547(b). The proceeding against Waldrip Bros, involved one check given prior to the ninety- day period but honored within it, and one check given and honored within the period.

The bankruptcy court granted summary judgment for Agri-Beef and Independent Grain, and partial summary judgment for Waldrip Bros. on that part of the claim involving the check given prior to the ninety-day period. The district court consolidated the appeals and affirmed. The trustee filed a timely appeal.

II.

A debtor's payment by check on an existing debt, presented to the bank within a reasonable time and honored by the bank, is deemed made at the time the debtor gave the check to the creditor. *Shamrock Golf Co. v. Richcraft, Inc.*,

680 F.2d 645 (9th Cir. 1982); [1] *In re Walker Industrial Auctioneers, Inc.*, 45 B.R. 452 (Bankr. Or. 1984) (applying *Shamrock Golf*). Payments made on existing debts within ninety days of the filing of the petition are voidable as preferences. 11 U.S.C. § 547(b). The payments here were not avoidable under section 547: The debtor gave the checks to the defendants before the ninety-day preference period started, the defendants presented the checks to the bank within a reasonable time, and the bank honored the checks.

The defendants request sanctions under Fed. R. App. P. 38 for a frivolous appeal. We decline to impose sanctions. However, on this appeal the trustee challenged, with little hope of succeeding, a well-settled Ninth Circuit rule. This circumstance may affect the bankruptcy or district court's determination of the trustee's fees for this litigation.

AFFIRMED.

---

[1] The bankruptcy proceeding in *Shamrock Golf* was governed by the 1898 Bankruptcy Act, but the case also referred to the 1978 Bankruptcy Code. There were no changes in the 1978 Code or in the 1984 Bankruptcy Code that suggest a reason to depart from the rule in *Shamrock Golf*.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Case No. 382-02649(7)

In re KENITRA, INC.,
Debtor.

Adversary No. 84-0356

ROBERT K. MORROW, INC.,
an Oregon corporation,
Plaintiff,

v.

AGRI-BEEF CO.,
an Idaho corporation,
Defendant.

Adversary No. 84-0360

ROBERT K. MORROW, INC.,
an Oregon corporation,
Plaintiff,

v.

WALDRIP BROS. CO.,
an Oregon corporation,
Defendant.

Adversary No. 84-0392

ROBERT K. MORROW, INC.,
an Oregon corporation,
Plaintiff

v.

INDEPENDENT GRAIN COMPANY,
a Montana corporation,
Defendant.

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REDDEN, Judge:

Plaintiff/appellant Robert K. Morrow, Inc. (trustee) in this consolidated bankruptcy action appeals the decision of the bankruptcy court that several payments made by check by debtor Kenitra, Inc. (Kenitra) were not preferential under 11 U.S.C. § 547(b).

Background

The trustee is the duly appointed and qualified successor trustee in bankruptcy of the estate of Kenitra.

On August 23, 1982 an involuntary petition for relief under Chapter 7 of the United States Bankruptcy Code was filed against Kenitra in the United States Bankruptcy Court for the District of Oregon (bankruptcy court).

The present controversy results from the delivery of three checks to defendants/appellees Independent Grain Company (Independent), Waldrip Bros. Co. (Waldrip), and

Agri- Beef Co. (Agri-Beef) (appellees). On May 21, 1982, Kenitra delivered a check in the amount of $9,087.65 to Independent. On the same day, Kenitra delivered a check in the amount of $11,101.75 to Waldrip. On May 24, 1982, Kenitra delivered a check in the amount of $10,416.26 to Agri-Beef. The Oregon Bank honored the checks, and appellees received payment thereon fewer than ninety days before the filing of the Chapter 7 petition. On August 9, 1984, the trustee commenced these adversary proceedings to recover the payments and other sums as preferential under 11 U.S.C. § 547(b). The trustee and appellees each moved the bankruptcy court for summary judgment with respect to the payments.

On December 28, 1984, the bankruptcy court entered its order partially dismissing the trustee's complaint against Waldrip, and dismissing with prejudice the trustee's complaints against Agri-Beef and Independent. On February 4, 1985, this court granted the trustee's motion for leave to appeal from the bankruptcy court's order, and ordered the consolidation of the cases for purposes of appeal.

I. Discussion.

Standard of Review.

In a proceeding where the facts are not disputed, the bankruptcy judge's legal conclusions are subject to this court's independent determination of legal questions. *In re Summit Creek Plywood Co., Inc.*, 5 B.R. 815, 817 (D. Or. 1980).

Analysis.

The issue presented in this case is whether a transfer for purposes of 11 U.S.C. § 547(b) (4) (A) is made upon delivery of the check by the debtor to the creditor or upon payment or acceptance of the check by the drawee bank.

Section 547 (b) (4) (A) provides:

> (b) Except as provided in subsection (c) of this section the trustee may avoid any transfer of property of the debtor—
>
> . . . .
>
> (4) made—
>
> (A) on or within 90 days before the date of the filing of the petition. . . .

The parties do not dispute that delivery of the checks occurred more than ninety days before the date of the filing of the petition. The parties agree that the checks were honored by the Oregon Bank within the ninety day period before the filing of the petition.

The trustee contends that when a debtor makes payment to a creditor by means of an uncertified check the transfer does not occur until payment or acceptance of the check by the drawee bank, unless the payee specifically agrees to accept the check in satisfaction of the underlying obligation. The trustee argues that because each of the uncertified checks delivered by Kenitra to appellees was paid within the applicable ninety-day preference period, the payments constitute preferential transfers avoidable by the trustee. Thus, the trustee argues that the bankruptcy court's order should be reversed and that the payments be found to be voidable preferences.

Appellees rely on *Shamrock Golf Company v. Richcraft, Inc.*, 680 F.2d 645 (9th Cir. 1982), in which the Ninth Circuit held that "the transfer" for purposes of 11 U.S.C. § 21(a) (2) (1976) (replaced by similar language in section 547(b)) occurs when the creditor receives the check, so long as the check is "presented within a reasonable time and not dishonored." *Id.* at 646. The rationale behind this holding is

that a payment by check constitutes a cash sale. *Id.* The Court based its decision in part on a prior holding in *Engstrom v. Wiley*, 191 F.2d 684, 686 (9th Cir. 1951), and on legislative history regarding contemporaneous transfers in section 547(c) of the 1978 Code.

The trustee contends that although *Shamrock* facially supports the appellees' position, the decision has no validity under the Bankruptcy Code and should not be followed by this court. The trustee argues that the Ninth Circuit has erroneously concluded that the relevant date in determining the transfer is the date the check is delivered. The trustee points to numerous contrary decisions from other jurisdictions. Additionally, the trustee argues that legislative history and state law support his position that the transfer occurs upon payment or acceptance of the checks by the drawee.

District courts, as well as bankruptcy courts, are bound by the law of their own circuit. They are not to resolve conflicts between circuits no matter how egregiously in error they may feel their own circuit to be. *Hasbrouck v. Texaco, Inc.*, 663 F.2d 930, 932 (9th Cir. 1981). Until it is reversed, the holding in *Shamrock* is still controlling in this circuit on this issue. *See In re Walker Industrial Auctioneers, Inc.*, 45 B.R. 452, 455 (Bankr. Or. 1984). The trustee's arguments, which I briefly address, do not detract from this requirement.

The decisions of courts from other circuits are not binding on this court. Most of the cases relied upon by the trustee do not present factual situations similar or useful to the present case. Much of the discussion from these cases, centering on when a transfer takes effect, is dicta, or based on code sections inapplicable in the present context. *See In re Walker Industrial Auctioneers, Inc.*, 45 B.R. at 455.

The trustee argues that the time of transfer should be different under section 547(b) than the time of transfer under section 547(c). Section 547(c) deals with, *inter alia*, contemporaneous exchanges and ordinary course of business transactions. Under this section, payment by check is considered the same as payment by cash. The court in *Shamrock* chose to analogize the matter to the contemporaneous exchange exception in section 547(c)(1) and concluded that the transfer will be deemed to have occurred upon delivery provided that the check is presented within a reasonable time and is not dishonored. *Shamrock*, 680 F.2d at 646; *see In re Arnett*, 731 F.2d 358 (6th Cir. 1984) (presentment of the check within thirty days is considered a reasonable time). The court made, by analogy to section 547(c), a valid policy decision concerning the time of transfer under section 547(b) — a decision binding on this court. *Shamrock* is also consistent with Oregon law and the Uniform Commercial Code. *See* O.R.S. 72.5120(3) and 73.8020(1) (b). Unlike the trustee, I do not find that the *Shamrock* court suffered from "an apparent lack of understanding of the preference laws." Nor do I find the trustee's distinction between certified and uncertified checks relevant to the present case.

Finally, the trustee argues that section 547 (e) applies to this case. Section 547(e) is only concerned with the perfection of security interests in various kinds of property. Ordinarily, the transfer of a check is not a transfer of a security interest in property. Thus, this transaction is not governed by section 547(e). *See O'Neill v. Nestle Libbys P.R., Inc.*, 729 F.2d 35 (lst Cir. 1984).

Conclusion

Appellees received their respective checks more than ninety days prior to the filing of the debtor's bankruptcy

petition. Each check was presented to the Oregon Bank within a reasonable time and was not dishonored. Based on *Shamrock*, the transfer for purposes of section 547(b) occurred upon delivery of the checks. Thus, in each case, there is no preference. Therefore, the decision of the bankruptcy court is affirmed.

Dated this 26 day of July, 1985.

s/s James A. Redden

United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Case No. 382-02649(7)

In re KENITRA, INC.,
Debtor.

Adversary No. 84-0356

ROBERT K. MORROW, INC.,
an Oregon corporation,
Plaintiff,

v.

AGRI-BEEF CO.,
an Idaho corporation,
Defendant.

Adversary No. 84-0360

ROBERT K. MORROW, INC.,
an Oregon corporation,
Plaintiff,

v.

WALDRIP BROS. CO.,
an Oregon corporation,
Defendant.

Adversary No. 84-0392

ROBERT K. MORROW, INC.,
an Oregon corporation,
Plaintiff

v.

INDEPENDENT GRAIN COMPANY,
a Montana corporation,
Defendant.

ORDER

REDDEN, Judge:

IT IS ORDERED that the decision of the bankruptcy court dismissing the trustee's complaint against Independent and Agri-Beef and partially dismissing the trustee's complaint against Waldrip is AFFIRMED.

Dated this 26 day of July, 1985.

s/s James A. Redden

United States District Judge

APPENDIX D

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Case No. 382-02649(7)

In re KENITRA, INC.,
Debtor.

Adversary No. 84-0392

ROBERT K. MORROW, INC.,
an Oregon corporation,
Plaintiff

v.

INDEPENDENT GRAIN COMPANY,
a Montana corporation,
Defendant.

ORDER OF DISMISSAL WITH PREJUDICE

Based on the stipulated findings of fact entered herein and the court's opinion in *In Re Walker Industrial Auctioneers, Inc.* __ B.R. __ (Bkrtcy. D. Or. 1984), it is hereby

ORDERED that the plaintiff's complaint herein be and hereby is dismissed with prejudice.

DATED this 28th day of December, 1984.

s/s Henry L. Hess, Jr.

Bankruptcy Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Case No. 382-02649(7)

In re KENITRA, INC.,
Debtor.

Adversary No. 84-0360

ROBERT K. MORROW, INC.,
an Oregon corporation,
Plaintiff,

v.

WALDRIP BROS. CO.,
an Oregon corporation,
Defendant.

ORDER OF PARTIAL DISMISSAL

Based on the defendant's motion for partial summary judgment, and the exhibits attached thereto, and based upon the court's opinion in *In Re Walker Industrial Auctioneers*, __ B.R. __ (Bkrtcy. D. Or. 1984), it is hereby

ORDERED that, as to that portion of the plaintif's [sic] cause of action regarding check no. 11877 in the amount of $11,101.75 dated May 19, 1982 the plaintiff's complaint be and hereby is dismissed.

DATED this 28th day of December, 1984.

s/s Henry L. Hess, Jr.

Bankruptcy Judge

APPENDIX G

SECTION 547 (11 U.S.C. § 547)

§ 547 Preferences.

(a) In this section —

(1) "inventory" means personal property leased or furnished, held for sale or lease, or to be furnished under a contract for service, raw materials, work in process, or materials used or consumed in a business, including farm products such as crops or livestock, held for sale or lease;

(2) "new value" means money or money's worth in goods, services, or new credit, or release by a transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the debtor or the trustee under any applicable law, but does not include an obligation substituted for an existing obligation;

(3) "receivable" means right to payment, whether or not such right has been earned by performance; and

(4) a debt for a tax is incurred on the day when such tax is last payable, including any extension, without penalty.

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of property of the debtor—

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made—

(A) on or within 90 days before the date of the filing of the petition; or

(B) between 90 days and one year before the date of the filing of the petition, if such creditor, at the time of such transfer—

(i) was an insider; and

(ii) had reasonable cause to believe the debtor was insolvent at the time of such transfer; and

(5) that enables such creditor to receive more than such creditor would receive if—

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

(c) The trustee may not avoid under this section a transfer—

(1) to the extent that such transfer was—

(A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and

(B) in fact a substantially contemporaneous exchange;

(2) to the extent that such transfer was—

(A) in payment of a debt incurred in the ordinary course of business or financial affairs of the debtor and the transferee;

(B) made not later than 45 days after such debt was incurred;

(C) made in the ordinary course of business or financial affairs of the debtor and the transferee; and

(D) made according to ordinary business terms;

(3) of a security interest in property acquired by the debtor—

(A) to the extent such security interest secures new value that was—

(i) given at or after the signing of a security agreement that contains a description of such property as collateral;

(ii) given by or on behalf of the secured party under such agreement;

(iii) given to enable the debtor to acquire such property; and

(iv) in fact used by the debtor to acquire such property; and

(B) that is perfected before 10 days after such security interest attaches;

(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor—

(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;

(5) of a perfected security interest in inventory or a receivable or the proceeds of either, except to the extent that the aggregate of all such transfers to the transferee caused a reduction, as of the date of the filing of the petition and to the prejudice of other creditors holding

unsecured claims, of any amount by which the debt secured by such security interest exceeded the value of all security interest for such debt on the later of—

(A)(i) with respect to a transfer to which subsection (b)(4)(A) of this section applies, 90 days before the date of the filing of the petition; or

(ii) with respect to a transfer to which subsection (b)(4)(B) of this section applies, one year before the date of the filing of the petition; and

(B) the date on which new value was first given under the security agreement creating such security interest; or

(6) that is the fixing of a statutory lien that is not avoidable under section 545 of this title.

(d) A trustee may avoid a transfer of property of the debtor transferred to secure reimbursement of a surety that furnished a bond or other obligation to dissolve a judicial lien that would have been avoidable by the trustee under subsection (b) of this section. The liability of such surety under such bond or obligation shall be discharged to the extent of the value of such property recovered by the trustee or the amount paid to the trustee.

(e)(1) For the purposes of this section—

(A) a transfer of real property other than fixtures, but including the interest of a seller or purchaser under a contract for the sale of real property, is perfected when a bona fide purchaser of such property from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest that is superior to the interest of the transferee; and

(B) a transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee.

(2) For the purposes of this section, except as provided in paragraph (3) of this subsection, a transfer is made—

(A) at the time such transfer takes effect between he transferor and the transferee, if such transfer is perfected at, or within 10 days after, such time;

(B) at the time such transfer is perfected, if such transfer is perfected after such 10 days; or

(C) immediately before the date of the filing of the petition, if such transfer is not perfected at the later of—

(i) the commencement of the case; and

(ii) 10 days after such transfer takes effect between the transferor and the transferee.

(3) For the purposes of this section, a transfer is not made until the debtor has acquired rights in the property transferred.

(f) For the purposes of this section, the debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition.

Supreme Court, U.S.
FILED
DEC 22 1986
JOSEPH F. SPANIOL, JR.
CLERK

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No. 86-807

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

ROBERT K. MORROW, INC., Trustee,

Petitioner,

vs.

AGRI-BEEF CO., INDEPENDANT GRAIN CO., and WALDRIP BROS. CO.,

Respondents.

On Petition for a Writ of Certiorari

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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December 22, 1986

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I. ARGUMENT

In this case, due to its small value, the trustee in bankruptcy had decided not to prosecute a petition for certiorari. He changed his mind only after he was approached by several outside counsel who have a similar issue, involving large sums of money, pending in other bankruptcy cases.

Respondent cannot afford to litigate its $11,000 claim in the United States Supreme Court. The Court would be ill-served by granting certiorari in this case. If it were to take the issue, it would be best to do so in one of the pending cases where the true interests of counsel for petitioners lie. In such a case, unlike here, the court could expect vigorous advocacy on both sides of the issue.

CONCLUSION

The Court Should deny the petition for certiorari filed in this case.

DATED: December 22, 1986

Respectfully submitted,

NEWCOMB, SABIN, SCHWARTZ & LANDSVERK

Jack B. Schwartz
Richard S. Pope

Counsel for Respondent
Waldrip Bros. Co.

(3)

Supreme Court, U.S.
FILED
JAN 6 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-807

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ROBERT K. MORROW, INC., Trustee,
Petitioner,

vs.

AGRI-BEEF CO., INDEPENDENT GRAIN CO., and WALDRIP BROS. CO.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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January 5, 1987

Lawyers Brief Service / Legal Publishers / (213) 383-4457 / (714) 720-1510

ARGUMENTS FIRST RAISED IN THE BRIEF IN OPPOSITION

Rule 22.5 of the Rules of the United States Supreme Court provides that "[a] reply brief addressed to arguments first raised in the brief in opposition may be filed by any petitioner." The brief in opposition has raised for the first time the following three arguments:

1. That this case is not important enough to merit review by this Court because it involves a controversy over a relatively small amount of money.

2. That the *Kenitra* issue should be decided by the Court, if at all, in some other pending Ninth Circuit case involving a large sum of money.

3. That certiorari should be denied because counsel for respondents decline to advocate their clients' legal position before the Court.

NEW CASE LAW

The Trustee calls attention to a newly decided case, *In re White River Corporation*, 799 F.2d 631 (10th Cir. 1986), pursuant to the provision for filing a supplemental brief at any time while a petition is pending calling attention to "new cases . . . not available at the time of the party's last filing." (Rule 22.6.)

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No. 86-807

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ROBERT K. MORROW, INC., Trustee,
Petitioner,

vs.

AGRI-BEEF CO., INDEPENDENT GRAIN CO., and WALDRIP BROS. CO.,
Respondents.

REPLY BRIEF

Petitioner Robert K. Morrow, Inc., Trustee, replies herein to the brief in opposition to petition for writ of certiorari ("brief in opposition") filed by respondent Waldrip Bros. Co. ("respondent").

I

REASONS FOR GRANTING THE WRIT

The Trustee has shown, in the petition filed with this Court, that "special and important reasons" exist to grant

the writ. (Rule 17.1.) The petition demonstrates that the holding by the Court of Appeals in this case conflicts with decisions reached by three other circuit courts. The petition also describes an important question of federal law which has not been, but should be, settled by the Court.

The brief in opposition raises issues that are entirely outside the record regarding the question of federal jurisprudence addressed by the court below. That question is whether, for purposes of 11 U.S.C. § 547(b), the debtor's property is "transferred" upon delivery of an uncertified check to the creditor or when such a check is honored by the drawee bank. Since the brief in opposition nowhere disputes that there are special and important reasons for the Court to grant the writ, the Court should consider the petition as unopposed.

In addition, the Trustee respectfully draws the Court's attention to a recently decided case, *In re White River Corporation*, 799 F.2d 631 (10th Cir. 1986). The Trustee has just discovered that case, which was decided after *Kenitra* but before the petition was filed. While *White River* is a judgment under 11 U.S.C. § 547(c)(2), rather than section 547(b), the Tenth Circuit's reasoning implies generally that a check is transferred on the date of delivery. To that extent, the *White River* opinion widens the split of authority between courts of appeal concerning transfers made by check relative to the preference statute.

II

ARGUMENT

A. When A Debtor's Property Is Deemed Transferred By Check Under 11 U.S.C. § 547(b) Is An Important Question of Federal Law Regardless of The Amount In Controversy

Preference litigation under section 547 of the Bankruptcy Code comprises a significant portion of the cases tried before the bankruptcy courts. The trustee cannot make out a prima facie case for the existence of a voidable preference unless the transfer of the debtor's property occurred within the preference period. The outcome of preference actions often depends upon whether the debtor's property is transferred, for purposes of section 547(b)(4), on honor of the debtor's uncertified check by the drawee bank. In the petition, the Trustee has cited 5 cases decided under the Bankruptcy Code which hold that the transfer occurs when the creditor receives the debtor's check, and 20 cases which hold that the transfer takes place upon the check's honor. (Petition 12-13.)

The importance of the question is not affected by the amount in controversy. The total amount that the Trustee sought to recover in the *Kenitra* lawsuits was $30,605.66. In other cases, the sum sued upon might be, and frequently is, $3,000,000. The aggregate of the sums affected by this controversy undoubtedly reaches into the billions.

B. The *Kenitra* Question Can Best Be Resolved By Granting A Writ of Certiorari To Review The Decision In *Kenitra*

There are other bankruptcy court cases involving the *Kenitra* issue already pending in the Ninth Circuit. (Brief in Opposition 1.) Indeed, the Trustee's out-of-state counsel represent plaintiffs in such adversary proceedings. The retention of out-of-state counsel in *Kenitra* is indicative of the widespread importance of determining when a debtor's property is transferred by check for parties engaged in bankruptcy litigation.

As a matter of judicial economy, it makes little sense to compel trustees, creditors' committees and debtors-in-possession in the Ninth Circuit to pursue a multitude of preference lawsuits involving the *Kenitra* issue before bankruptcy courts, bankruptcy appellate panels, district courts and the Court of Appeals. The lower courts are bound by the rule of law set down by the circuit court. The Ninth Circuit cannot reasonably be expected to reverse its recent holding in *Kenitra*. Forcing this issue to be tried again through the Ninth Circuit would be nothing more than an exercise in futility and waste.

Moreover, the last paragraph of the *Kenitra* decision makes plain enough that any further challenge of "a well-settled Ninth Circuit rule" would invite the imposition of sanctions and reduction of fees. 797 F.2d at 791. (Petition A-3.)

The *Kenitra* question has been squarely posed by the Ninth Circuit decision and can best be resolved by review of that decision.

C. Certiorari Should Not Be Denied Because Counsel For Respondents Decline to Argue Their Clients' Case

The Rules of the United States Supreme Court do not provide for denial of the writ simply because counsel for respondents decline to argue their clients' legal position. Otherwise, respondents could defeat a petition for writ of certiorari merely by failing to contest it.

Both sides of the issue in *Kenitra* have been fully briefed before the Ninth Circuit. There is no reason to believe that such vigorous advocacy could not be continued before this Court.

D. The Widening Split of Authority On The *Kenitra* Question Should Be Resolved To Safeguard The Predictability of Commercial Transactions And Bankruptcy Administration

As the petition points out, the Second, Seventh and Eleventh Circuits held under the analogous preference provisions of the Bankruptcy Act that a transfer of the debtor's property is effected when the check clears the drawee bank. (Petition 6-9.) By contrast, the Ninth Circuit held in *Shamrock Golf Co. v. Richcraft, Inc.*, 680 F.2d 645 (9th Cir. 1982) that the transfer is complete upon the check's delivery. The Ninth Circuit sharpened the conflict by its decision under section 547(b) of the Bankruptcy Code in *Kenitra*.

The recent opinion by the Tenth Circuit in *In re White River Corporation*, 799 F.2d 631 (10th Cir. 1986), decided subsequent to *Kenitra*, widened still further the split of

authority regarding when a transfer made by check occurs with respect to the preference section.

In *White River*, the Tenth Circuit addressed the question whether transfers by check were "made not later than 45 days after such debt was incurred" for purposes of the affirmative defense provision of 11 U.S.C. § 547(c)(2). The checks in question were delivered to the creditor less than 45 days after the debt was incurred, and honored by the drawee bank more than 45 days after the debt accrued. The bankruptcy court held that lease payments fell outside the section 547(c)(2) defense based on the date-of-honor rule and the district court affirmed. The Tenth Circuit reversed, holding that the transfers occurred upon delivery of the checks. 799 F.2d at 633.

White River concerned when a check is transferred with respect to the affirmative defense set forth in section 547(c)(2). Thus, the holding in *White River* is not applicable per se to *Kenitra*, which adjudicated when a transfer by check occurs for purposes of proving the prima facie case under section 547(b)(4). Nonetheless, the reasoning of the *White River* opinion is sufficiently broad to extend the decision's impact to consideration of whether a check transfer takes place within the preference period.

The *White River* court noted that it was persuaded by the First Circuit's analysis in *O'Neill v. Nestle Libbys P.R., Inc.*, 729 F.2d 35, 37-38 (1st Cir. 1984), in holding that a transfer occurs upon delivery of the check. 799 F.2d at 633. In *O'Neill*, the First Circuit stated that "[s]ince checks are normally considered present payments between parties, *Engstrom v. Wiley*, 191 F.2d 684 (9th Cir. 1951), the *delivery* of a check should supply the time of transfer" (emphasis in original). Likewise, *White River* cited, 799 F.2d at 634, a district court in Michigan to the effect that "in the

commercial world receipt of a check, as distinguished from the date it clears the drawee bank, is customarily looked upon as the date of payment of an obligation." *Young Supply Co. v. McLouth Steel Corp.*, 55 B.R. 356, 357 (E.D. Mich. 1985).

It is significant that both the *O'Neill* and *Young Supply* decisions, on which the *White River* opinion relies, point to the Ninth Circuit's holding in *Shamrock* to support the proposition that receipt of a check should be looked upon as the date of transfer. 729 F.2d at 37; 55 B.R. at 357. Such references to *Shamrock* point up the cross-fertilization between analysis of a check's transfer under the affirmative defenses of section 547(c) and under the prove-up of the prima facie case. Most courts have held that the debtor transfers no property, for purposes of section 547(b), until the drawee bank honors the check.[1] However, some courts, such as *Kenitra*, have mistakenly applied the rationale of the section 547(c) affirmative defenses to the elements of section 547(b).

Article I, § 8, cl. 4, of the United States Constitution provides that Congress shall have power to "establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." *See, Railway Labor Executives Assn. v. Gibbons*, 455 U.S. 457, 102 S.Ct. 1169, 71 L.Ed.2d 335 (1982). Congress has established such a uniform law in enacting the Bankruptcy Code, and the section on the avoidance of preferences is one of the statute's most frequently litigated provisions.

The widening split of authority on the *Kenitra* question undermines the uniformity required by the Bankruptcy

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[1] Countryman, *The Concept of a Voidable Preference in Bankruptcy*, 28 Vand. L. Rev. 713, 761-63 (1985).

Clause. Creditors receiving payments from troubled business enterprises now face radically different legal consequences, depending on which line of cases is, or might be, followed. The legal consequences of business conduct should not differ as to a question of federal law depending on where the litigation takes place. The Trustee respectfully requests a decision from this Court that will safeguard the predictability of commercial transactions and bankruptcy administration with regard to this pressing issue.

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